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Supreme Court of the United States

OCTOBER TERM, 1961

No. 468

IN THE MATTER OF THE APPLICATION

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents,

directing them to discontinue a certain school practice

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenors-Respondents.

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

Opinions Below

The opinion of the Special Term of the Supreme Court of the State of New York, Nassau County (R. 50-116), is reported at 18 Misc. 2d 659, 191 N. Y. S. 2d 453. The

majority and concurring opinions of the Appellate Division of the Supreme Court of the State of New York, Second Department (R. 123-40), are reported at 11 App. Div. 2d 340, 206 N. Y. S. 2d 183. The majority, concurring and dissenting opinions of the Court of Appeals of the State of New York (R. 142-55) are reported at 10 N. Y. 2d 174, 184 N. Y. S. 2d 659, 176 N. E. 2d 579.

Constitutional and Statutory Provisions Involved

While petitioners in their brief (pp. 2-3) have set forth the First and Fourteenth Amendments to the Federal Constitution, as well as the resolution of the respondent Board of Education of July 8, 1958 (R. 40), pursuant to which the saying of the Regents' Prayer was instituted as a daily procedure in the schools of the District, there should also be included at this point the regulation adopted by respondents on September 3, 1959, which read (R. 171-2):

> "1. Neither teachers nor any school authority shall comment on participation or non-participation in the exercise nor suggest or request that any posture or language be used or dress be worn or be not used or not worn.
>
> 2. Provision is to be made for those children who are to be excused from participating or from the room during the prayer exercise.
>
> 3. Any child may be excused on written request of the parent or legal guardian and all parents will be so advised that the request should be so made, addressed to the principal of the school which the child attends."

Each parent and taxpayer received a letter (R. 172-3) which advised that opening exercises at school included

the Regents' Prayer, set forth at length, after which, the letter read:

> "Any parent or guardian who does not wish his child to say the prayer is requested to write a letter to the principal of the school his child attends, indicating whether he wants his child excused from the room or to remain silent in the room while the prayer is being said."

Question Presented

Do the First and Fourteenth Amendments compel the total abolition of a brief non-denominational prayer composed by the Board of Regents of the University of the State of New York in language taken from the preambles of various State Constitutions, in accordance with an historic tradition of public prayer and recommended by the Regents for voluntary recital by public school pupils in conjunction with the pledge of allegiance to the flag in an attempt to provide in the public schools of New York a simple recognition of this country's moral and spiritual heritage, where there is no showing of any compulsion upon any pupil to participate, and when any pupil whose parents object is excused from participation?

Statement of the Case

A. The Background of the Litigation.

The petitioners in a special proceeding under Article 78 of the New York Civil Practice Act (R. 9-18) sought an order directing the respondents, the Board of Education of Union Free School District Number Nine, New Hyde Park, New York (hereinafter sometimes referred to as the "Board"), to require them to discontinue or cause to be discontinued in the schools of said school district the saying of the prayer (sometimes referred to herein as the

"Regents' Prayer") daily in said schools following the Salute to the Flag pursuant to a resolution passed by respondents (R. 40).

The New York Supreme Court, Special Term (Meyer, J.), in a lengthy and careful opinion (R. 50-116; 18 Misc. 2d 659), held that the Regents' Prayer did not violate either the Federal or the State Constitutions. It ruled that the "establishment" clause of the First Amendment did not prohibit the non-compulsory saying in the public schools of that Prayer but that the "free exercise" provision of the First Amendment required that parents be advised of the adoption of the School Board's resolution so requiring, of the wording of the Prayer and of the procedure to be followed in its recital, so that a conscious choice could be made whether a child should or should not participate.

In arriving at these conclusions, the Court below reasoned:

> The question involved is one of constitutional power, not of policy.
>
> There is in our constitutional history, however, and in the history of public education a long tradition of prayer.
>
> Nothing in the history of the First or Fourteenth Amendments or in the personal views of Franklin, Madison or Jefferson suggests any intention to exclude non-compulsory prayer from the schools.
>
> Freedom of religion includes the right publicly to express religious beliefs.
>
> The "establishment" clause prohibits direct compulsion on individuals in matters of religion, but prohibits indirect compulsion (through tax payments, for example) only when the state and religion are too closely connected. "The democratic nature of our government precludes the imposition of sanctions in the field of religion; the religious nature of the governed sanctions

the inclusion of religion in the processes of democratic life; the dividing line between permitted accommodation and proscribed compulsion is a matter of degree, to be determined anew in each new fact situation." (R. 96)

The religion clauses protect non-believers as well as believers; every individual has a constitutional right personally to be free from religion, but he may not compel others to adopt the same attitude.

The Regents' Prayer is not religious instruction. Recital of it is not within prohibited degree as an indirect compulsion.

Religious tensions and division over the saying of the prayer is not a constitutional reason for not permitting it to be said. "The genius of the American experiment has been not a lack of difference in point of view, but absolute equality in matters of thought and belief despite all differences." (R. 112)

The Regents' Prayer is not sectarian merely because it does not fully accord with the tenets of all of petitioners' or any group's beliefs. So long as "each is free to follow his own predilection with respect to prayer, to participate in a prayer exercise or to refuse to do so, the exercise cannot be deemed preferential." (R. 113)

The order entered upon this determination in Supreme Court, Nassau County (to the extent relevant to appellate proceedings) denied the petition (and accordingly refused to order the discontinuance of the Regents' Prayer), denied petitioners' demand for a jury trial, and directed that the matter be remanded to the respondent Board of Education for proceedings not inconsistent with the Court's opinion (R. 6-8). That opinion in substance directed the Board to adopt certain specific safeguards, confirming its existing practice, to ensure that the recital of the Regents' Prayer was a voluntary matter, to be observed or not at the election of the child or his parents (R. 8, 105-09).

On appeal to the Appellate Division, Second Department, this order was affirmed *per curiam*, one Justice concurring in part and dissenting in part (R. 124-25; 11 App. Div. 2d 340). A final order was then entered in Supreme Court, Nassau County, dismissing the proceeding on the merits on the ground that respondent School Board, by taking the steps recited at page 2 above, had complied with the directions of Special Term, as affirmed (R. 148-49).

The Court of Appeals, by a 5 to 2 vote, affirmed the decisions below (10 N. Y. 2d 174). That Court first held that there were:

> "• • • adequate provisions to ensure that no pupil need take part in or be present during the act of reverence so any question of 'compulsion' or 'free exercise' is out of the case (see Zorach v. Clauson, 343 U. S. 306)."

The Court went on to hold that the vountary recital of the Prayer was not an "establishment of religion," saying:

> "The 'Regents prayer' is an acknowledgment of our dependence upon Almighty God and a petition for the bestowal of His blessings. It includes an acknowledgment of the existence of a Supreme Being just as does the Declaration of Independence and the Constitutions of each of the 50 States of the Union, including our own. In construing even a Constitution some attention must be paid to the obvious intent of those who drafted it and adopted it (*Matter of Carey* v. *Morton*, 297 N. Y. 361). That the First Amendment was ever intended to forbid as an 'establishment of religion' a simple declaration of belief in God is so contrary to history as to be impossible of acceptance.

Judge Froessel, in his concurring opinion, said:

> "The narrow question presented is: Do the Federal and State Constitutions prohibit the recitation by chil

dren in our public schools of the 22 words acknowledging dependence upon Almighty God, and invoking His blessing upon them, their parents and teachers, and upon our country? To say that they do seems to me to stretch the so-called separation of church and State doctrine beyond reason.

* * * * * *

One may earnestly believe in God, without being attached to any particular religion or church. Hence a rule permitting public school children, willing to do so, to acknowledge their dependence upon Him, and to invoke His blessings, can hardly be called a 'law respecting an establishment of religion' or 'prohibiting the free exercise thereof'' in transgression of the First Amendment which in nowise prohibits the recognition of God, or laws respecting such recognition.

The challenged recitation follows the pledge of allegiance, which itself refers to God. School children are permitted to sing 'America', the fourth stanza of which is indeed a prayer, invoking the protection of 'God', 'Author of Liberty'. The preamble to our State Constitution, wh. h is taught in our public schools, provides: 'We the People of the State of New York, grateful to Almighty God for our Freedom'. Virtually every State Constitution in the United States, as well as the Declaration of Independence, contains similar references. To say that such references, and others of like nature employed in the executive, legislative and judicial branches of our Government (see *Zorach* v. *Clauson*, 343 U. S. 306, at pp. 312-313), unrelated to any particular religion or church, may be sanctioned by public officials everywhere but in the public school room defies understanding.

* * * * *

Here no partiality is shown, nor are classrooms being turned over to religious instructors as in

McCollum v. *Board of Educ.* (333 U. S. 203). Any effort of a particular group to promote its own beliefs, doctrines, tenets and dogma must be carried on outside the public school, and any law to the contrary would violate the First Amendment. (*McCollum* v. *Board of Educ., supra.*)

As we see it, then, the challenged recitation was rightly upheld. It is not compulsory, is clearly nonsectarian in language, and neither directly nor indirectly even suggests belief in any form of organized or established religion. It permits each child to express gratitude to God and to invoke His blessing, to be steadfast in the faith of his acceptance if he has one; it compels no one, directly or indirectly, to do anything, if that be his or his parents' wish. All remain free, and thus we do not show preference as between 'those who believe in no religion' and 'those who do believe' (*Zorach* v. *Clauson, supra,* p. 314)."

B. The Regents' Prayer.

The Regents' Prayer, the voluntary recital of which petitioners now seek to prohibit in all the public schools of the State, say simply this:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

This prayer was adopted by the respondent Board in accordance with the Statement of Belief adopted by the New York State Board of Regents on November 13, 1951 (R. 28-29) and the Supplemental Statement of 1955 setting forth the Regents Recommendation for School Programs on America's Moral and Spiritual Heritage (R. 30-39). Its language was borrowed from provisions appearing in the Constitutions of nearly all of the states of the Union. (*Cf.* Appendix A to this Brief.)

The Prayer was recommended by the Regents as a means of:

> "• • • stressing the moral and spiritual heritage which is America's, the trust which our pioneering ancestors placed in Almighty God, their gratitude to Him from Whom they freely and frequently acknowledged came their blessings and their freedom and their abiding belief in the free way of life and in the universal brotherhood of man based upon their acknowledgment of the fatherhood of their Creator, Almighty God, Whom they loved and reverenced in diverse ways." (Regents' Statement on Moral and Spiritual Training in the Schools) (R. 28-29)

In this Statement the Regents declared:

> "Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded.
>
> Our State Constitution opens with these solemn words: 'We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, do establish this Constitution.'
>
> We are convinced that this fundamental belief and dependence of the American—always a religious—people is the best security against the dangers of these difficult days. In our opinion, the securing of the peace and safety of our country and our State against such dangers points to the essentiality of teaching our children, as set forth in the Declaration of Independence, that Almighty God is their Creator, and that by Him they have been endowed with their inalienable rights of life, liberty, and the pursuit of happiness" (R. 28).

The same principles were repeated by the Regents four years later in their unanimous "Recommendation

for School Programs on America's Moral and Spiritual Heritage" (R. 30-39).

> " 'All men are created equal' is the basic principle of the Brotherhood of Man, and 'endowed by their Creator with life, liberty and the pursuit of happiness' is the recognition of the Fatherhood of God, and that these most precious rights come from the Creator and not from the kings, princes or other men. The proposition that 'government derives its just powers from the consent of the governed' is a recognition of the dignity, worth and sovereignty of each individual under God and of the concept of the individual as a sovereign citizen who, with his fellow citizens, is master of the state they have created and not its servant.
>
> The American people have always been a religious people, believing in God each in accordance with his own conscience. As our Supreme Court well stated, 'We are a religious people whose institutions presuppose a Supreme Being' " (R. 33-34).
>
> • • • • •
>
> "The same will give to the student an understanding and appreciation of his role as an individual endowed by his Creator with inalienable rights and as a member of a group similarly endowed: of respect for others, particularly parents and teachers, of devotion to freedom and of reverence for Almighty God" (R. 38).

In recommending this program, which is nothing more than a reaffirmation of our long historical traditions, the Regents specifically warned:

> "In putting such recommendations into effect teachers will be mindful always of the fundamental American doctrine of the separation of church and state, and careful at all times to avoid any and all

sectarianism or religious instruction which advocates, teaches or prefers any religious creed. Formal religion is not to be injected into the public school. It is a matter for the church and the home, for the religious leaders and the parents of each child" (R. 32).

There is no evidence in this case that any pupil in the schools operated by respondent School Board has been subjected in the schools to any sectarian or other formal religious teaching. Undisguised, petitioners' attack is against any voluntary public recognition of belief and trust in God in an effort to obliterate from our public schools any recognition—even on a voluntary basis—of the existence of a Divine Being. In their briefs and arguments below and in their Petition to this Court they attack not merely the Regents' Prayer but any form of prayer whatsoever. They deny to every public school the right to suggest to any child that God is our Creator and the Author of our liberties or to encourage any public expression of gratitude to Him for those liberties, regardless of the wishes of the child or his parents and regardless of the historical and constitutional tradition of this nation.

Summary of Argument

1. The establishment clause of the First Amendment does not prohibit a recognition of Almighty God in public prayer, but on the contrary the history and growth of the United States as evidenced in documents from the earliest days of our nation to the present time would indicate such recognition as a part of our national heritage.
2. The establishment clause of the First Amendment was intended to prohibit a State religion but not to prevent the growth of a religious State. Non-compulsory recitation of the Regents' Prayer does not breach the principle of separation of church and State.

3. The saying of a prayer in public assemblies is traditional in this nation and in the State of New York where it has existed for over a century.

4. The authorities support the position that the non-compulsory recitation of the Regents' Prayer causes no pocket book injury; that voluntary expressions of belief in God should not be abolished because they are allegedly in conflict with the beliefs of some; that, as in the case of the Pledge to the Flag, those who object because of an alleged conflict with their belief should be permitted to refrain from participating, as in the case before the Court, but there should not be an abolition of such voluntary recital.

ARGUMENT

POINT I

Recognition of Almighty God in public prayer is an integral part of our national heritage.

Referring to the First Amendment to the Constitution of the United States, the New York Special Term has said that it agrees that:

> "... the 'establishment' clause cannot have been intended to outlaw the practice in schools any more than from the rest of public life; that is, that prayer in the schools is permissible not as a means of teaching 'spiritual values' but because traditionally, and particularly at the time of the adoption of the First and Fourteenth Amendments, this was the accepted practice." (R. 70-71)

Every adult will recall that he came to know, in his earliest days in school through courses variously designated as History or Citizenship Education, or perhaps even earlier at his father's knee through learning about

the Fourth of July celebration, the significance of the Declaration of Independence. That historic document refers to Almighty God in no less than four instances:

(a) "• • • laws of nature and of nature's God entitled them • • •"

(b) "• • • All men are endowed by their Creator with certain inalienable rights • • •."

(c) "• • • the Supreme Judge of the world • • •."

(d) "• • • with a firm reliance on the protection of Divine Providence • • •."

These references were not accidental but on the contrary were in accord with the basic traditions of both those who originally settled our land and those who came later. The feeling was not restricted to those relatively few men who had a part in establishing this country as a nation but also was a recognition observed by those in whose hands was placed the destiny of the various States which made up the Union. In this connection there have been collected in Appendix A hereto extracts from the Preambles or Constitutions of 49 of the 50 States making similar references.

The Congress of the United States which was responsible in the first instance for adopting the First and Fourteenth Amendments has throughout its history opened the sessions of both houses each day with a prayer seeking Divine guidance and acknowledging the existence of Almighty God.

It is, of course, a matter of common knowledge that both the New York State Senate and Assembly commence their legislative sessions with prayer.

Further recognition of the official observance of prayer is contained in Section 24 of the New York State General Construction Law where in defining the term holiday is

included "* * * each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other religious observances * * *."

Nor was the subject of our national heritage overlooked when our Legislature established the New York State Education Law for, we find the Regents being directed (Sec. 801) to prescribe courses of instruction " in the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the state of New York and the amendments thereto * * *." Special Term, in a slightly different vein in its opinion below, has traced "the history of the constitutional provisions and of public education" (R. 71-82) on which respondents will rely, without unnecessary repetition in this brief.

POINT II

The Constitution of the United States is incapable of being so interpreted as to require that the wall of separation of church and State become an iron curtain.

"God who gave us life, gave us liberty. Can the liberties of a nation be secure when we have removed the conviction that these liberties are the gift of God?" These are the words of Thomas Jefferson (referred to in Appendix C, hereto) who, it has been recorded, is the author of some of our fundamental historic documents and the famous phrase "wall of separation of church and State."

Zorach v. *Clauson*, 303 N. Y. 161 (1951), 343 U. S. 306, is one of the most recent and most famous cases involving the separation of church and State in either this State or in the history of the United States Supreme Court. There was there involved the released time program which had been authorized by the State Legislature in 1940, re-

sulting in the promulgation of regulations relating thereto by the Commissioner of Education of the State of New York and, in that particular case, additional rules established by the New York City Board of Education.

There, as in the instant case, the choice of whether to join in the program or not was that of the parents and the children and there, too, many if not all of the charges contained in the petitioners' pleading herein were voiced (as a matter of fact the language of the pleading in that case and in this case are almost identical). After the courts of New York had consistently upheld "released time" against constitutional attack, this Court affirmed their rulings, holding that government and religion need not be implacably hostile but could, to a reasonable extent, accommodate each other's legitimate interests.

The intent of the First Amendment has more recently been the subject of a judicial decision in New York State as it appears in the opinion of Mr. Justice Bookstein in *Lewis* v. *Allen*, 5 Misc. 2d 68, 159 N.Y.S. 2d 897, in the following language:

> "If I properly apprehend the intent, design and purposes of the First Amendment, it was conceived to prevent and prohibit the establishment of a *State Religion;* it was not intended to prevent or prohibit the growth and development of a *Religious State.*
>
> This concept finds judicial support in Holy Trinity Church v. United States, 1892, 143 U. S. 457, at page 470, 12 S. Ct. 511, at page 516, 36 L. Ed. 226, where the Court says 'this is a religious nation'.
>
> In 1951, that Court said in Zorach v. Clauson, 343 U. S. 306, at page 313, 72 S. Ct. 679, at page 684, 96 L. Ed. 954, 'We are a religious people whose institutions presuppose a Supreme Being'.
>
> The Declaration of Independence refers to 'the Supreme Judge of the world', and 'the protection of Divine Providence'. Lincoln, at Gettysburg, spoke of

'this nation, under God'. Even the preamble to the New York Constitution expresses gratitude 'to Almighty God for our Freedom'. Indeed, the presidential oath of office concludes, 'So Help Me, God'. By Act of Congress, our coins are inscribed, 'In God we trust'.

If petitioners' contention be sound, it may be wondered whether the public school curriculum might properly include the Declaration of Independence and the Gettysburg address. Could 'America' ('* * * Protect us by thy might, Great God, our King!') be sung in a public school without offending the First Amendment? And might not the presidential oath of office have questionable constitutional status?" (p. 812; Italics by the Court)

Nor were the rhetorical questions left unanswered by the Court for the Justice found support once more in authoritative judicial and legislative interpretation as follows:

"These questions find their answer in House Report No. 1693,* note 2, supra. There the Committee on Judiciary notes:

"The Supreme Court has clearly indicated that the references to the Almighty which run through our laws, our public rituals and our ceremonies in no way flout the provisions of the first amendment (Zorach v. Clauson, 343 N. S. 306, 312-313 '72 S. Ct. 679, 96 L. Ed. 954'). In so construing the first amendment, the Court pointed out that if this recognition of the Almighty was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, 'God save the United States and the Honorable Court' (Id., [343 U. S.] 313 [72 S. Ct. 683])". (pp. 812-813)

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* This Report is set forth in Appendix B hereto.

The facts in the foregoing case, *Lewis* v. *Allen*, 5 Misc. 2d 68, 159 N.Y.S. 2d 807, show that the proceeding was brought on by petition under Article 78 to compel the Commissioner of Education to perform a duty which allegedly he had failed to perform with respect to a regulation calling for the use of the phrase "Under God" in the Pledge of Allegiance to the Flag of America. Petitioners there contended that, as in the instant case, there was some nebulous "non-discretionary duty" on the part of the Commissioner of Education to rescind his regulations regarding the new Pledge, as it had been enacted by Congress in 1954. There, too, as here, the petitioners claimed there was some *compulsory* aspect about even a voluntary reference to God by others, and that such compulsion violates the same portions of the Federal and State Constitutions as petitioners have referred to in the instant case. The Court there noted (as we would respectfully urge the Court here to note) that there was "no compulsory aspect. No penalties attached to a failure or refusal to recite the Pledge. The Pledge is made voluntarily and no penalties are imposed for non-compliance" (p. 811).

POINT III

Judicial, legislative, administrative and text writers have agreed that what the framers of the First Amendment had in mind did not project the idea of wall of separation of church and State into a "governmental hostility to religion" which would be "at war with our national tradition."

For a century and a half, the First Amendment has been a guide to the religious freedom of this country and, while it has existed, public recognition of God, of religion and of prayer has continued and flourished. Throughout the field of text writing, judicial pronouncements, legislative enactments and administrative implementation for all of this period we find a pattern which recognizes the intent and

meaning of the framers of the First Amendment which is confirmatory of their own public pronouncements.

As stated by Judge Desmond in his concurring opinion in *Zorach* v. *Clauson*, 303 N. Y. 161, 175, if the idea that any governmental recognition of God's existence is unconstitutional,

> "then every President has offended by invoking the Deity in his oath of office, by issuing Thanksgiving proclamations and calling on our people to pray for victory in war, or for peace, or for our soldiers' safety. If petitioners are right, then there is a violation every time a chaplain opens a Congressional session with prayer, or an army bugler sounds 'Church call'. If petitioners are right, then the Pilgrims were wrong as was every President who officially urged our people to train themselves in, and practice, religion. Our own State Constitution, on petitioners' theory offends against American Constitutionalism at the point in its preamble where it expresses gratitude 'to Almighty God' for our freedom. Petitioners would have this court now deny the declarations of the Supreme Court in the *Church of Holy Trinity* v. *United States* case, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226 and of Chief Justice Kent in the *People* v. *Ruggles* case, 8 Johns. 290, in 1811, that ours is a religious nation. I stand on Chief Justice Kent's declaration, long ago in the *Ruggles* case, 8 Johns. at page 296, that the Constitution 'never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law'."

Nor did Judge Froessel, also writing in *Zorach* v. *Clauson*, 303 N. Y. 169, at page 170, overlook the thought that the constitutional provisions regarding the relationship of religion and the State were two-fold, in that while on the one hand they prohibited the establishment of a State

church, on the other hand they also prohibited any law interfering with the "free exercise" of religious profession. Thus, in quoting from a previous Court of Appeals case (*Lewis* v. *Graves*, 245 N. Y. 198), he calls attention to the language:

> "Neither the Constitution nor the law discriminate against religion. Denominational religion is merely put in its proper place outside of public aid or support."

Again, in his opinion Judge Froessel points to the fallacy of eliminating every "friendly gesture" between church and State on the theory of "separation" when he says (at p. 172):

> "It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called 'wall of separation' may be built so high and so broad as to impair both State and church, as we have come to know them. Indeed, we should convert this 'wall', which in our 'religious nation', *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 470, 12 S. Ct. 511, 36 L. Ed. 226, is designed as a reasonable line of demarcation between friends, into an 'iron curtain' as between foes, were we to strike down this sincere and most scrupulous effort of our State legislators, the elected representatives of the People, to find an accommodation between constitutional prohibitions and the right of parental control over children. In so doing we should manifest 'a governmental hostility to religion' which would be 'at war with our national tradition', *People of State of Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71 supra*, 333 U. S. at page 211, 68 S. Ct. at page 465, and would disregard the basic tenet of constitutional law that 'the public interests imperatively demand—that legis-

> lative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution', *Atkin* v. *State of Kansas*, 191 U. S. 207, 223, 24 S. Ct. 124, 128, 48 L. Ed. 148.
>
> "While extreme care must, of course, be exercised to protect the constitutional rights of these appellants, it must also be remembered that the First Amendment not only forbids laws 'respecting an establishment of religion' but also laws 'prohibiting the free exercise thereof'. We must not destroy one in an effort to preserve the other."

Further in establishing the intent of Congress, Cooley's Principles of Constitutional Law, 224-225, 3rd ed. (1898) read as follows:

> "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others (citing 1 Tuck, Bl. Com. App. 296; 2 id., App., Note G). It was never intended by the Constitution that the government should be prohibited from recognizing religion, • • • where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects."

The emphasis, indeed, reemphasis of America's moral and spiritual heritage, as promulgated by the New York State Board of Regents, the Commissioner of Education and the respondent School Board through the daily voluntary use of the Regents' prayer draws no "invidious distinctions between different religious beliefs, organizations, or sects" as referred to in the preceding quotation.

As said by Mr. Justice Douglas, speaking for the majority of this Court in *Zorach* v. *Clauson*, 343 U. S. 306 (1952):

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of church and State * * * otherwise, the State and religion would be aliens to each other—hostile, suspicious and even unfriendly * * *. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.' * * *. We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective

> scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."

As the facts indicate, there is no compulsory aspect attached to the saying of the Regents' prayer in the School District in question, nor is there any effort to foster sectarian religion in the schools any more so than when, as Mr. Justice Douglas pointed out above, the Court itself commences its day with a prayer.

One might wonder if the Supreme Court prayer were slightly reworded so as to read "God save the United States and this School District" whether our opponents might then say that this is "an establishment of religion." Could petitioners then say that such a prayer is forcing "some religion on any person" or that this is thrusting "any sect on any person" or that it makes "a religious observance compulsory" or amounts to "religious instruction"?

Does the prayer used by this Court amount to "an establishment of religion"? Is this sectarian? Would this infringe the rights of either the judiciary or the attorneys appearing on behalf of litigants? Rather would it not be in keeping with our American tradition of voluntary public prayer and our moral and spiritual heritage? We submit that it is the latter.

Attention should also be drawn to House Report No. 1693 set forth in toto in Appendix B to Respondents' brief, where Representative Rabaut who introduced the resolu-

tion which led to the insertion of the words "under God" in the Pledge of Allegiance, stated:

> "Children and Americans of all ages must know that this is one Nation which 'under God' means liberty and justice for all"

and again he said:

> "By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government. In this full awareness we will, I believe, be strengthened for the conflict now facing us and more determined to preserve our precious heritage.
>
> "More importantly, the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. As they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us. Fortify our youth in their allegiance to the flag by their dedication to 'one Nation, under God'."

The report itself did not overlook the First Amendment and the establishment clause for, after tracing many of the public pronouncements in which God had been clearly recognized, the report says:

> "It should be pointed out that the adoption of this legislation in no way runs contrary to the provisions of the first amendment to the Constitution. This is not an act establishing a religion or one interfering with the 'free exercise' of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God."

Finally, we come to the well known rule of law that administrative interpretation of a statute is to be given great weight in determining its intent, meaning and purpose. While by no means contending that such an interpretation is infallible, a long continued practical and contemporaneous construction is entitled to great significance. See *Dole* v. *City of New York*, 44 N.Y.S. 2d 250 (1943), where the Court said:

> "Considerable force must be attached to the practical construction of the statute by 'public officers whose duty is to enforce it, acquiesced in by all for a long period of time'." (Citing cases) (pp. 252-253)

At the very outset of the Special Term's opinion below, the learned Justice refers to and quotes a policy statement adopted by the Superintendent of the New York public schools in 1837 (154-159). It is apparent from a reading thereof that over 120 years ago the trustees of a school system were given the approval of the Superintendent "to commence the business of the day by public prayer" (R. 53). The opinion of the Superintendent not only has been on record for many years but (as the Special Term pointed out) the ruling originally promulgated in 1837 was repeatedly reaffirmed by successive superintendents right down to 1909. We, therefore, have difficulty in reconciling a statement heretofore made by petitioners that respondents "seek to end the constitutionally-sanctioned and time honored trend of separation of church and state, by the introduction of a new-fangled Prayer into the schools of a District in which prayers were not heretofore said."

The Regents of the State of New York, by way of administrative interpretation, in 1951 first promulgated the prayer which is the subject of this litigation and recommended it for use in the school districts under their jurisdiction, suggesting that "at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God" (R. 53-54)

and pursuant to such recommendations, it has become a matter of public knowledge many of the school districts here on Long Island have adopted the recommended procedure of having the prayer said daily in the class rooms as part of the opening exercises (See Exhibit "A" of Affidavit of William J. Vitale, Jr. attached to respondents' answer for 1951 promulgation by Regents (R. 28-29)). In 1955 the Board of Regents saw fit to supplement the 1951 statement (Id. Exhibit "B" (R. 30-39)).

POINT IV

A few seconds of voluntary prayer in the schools, acknowledging dependence on Almighty God, is consistent with our heritage of "securing" the blessings of freedom which are recognized in both the Federal and State Constitutions as having emanated from Almighty God.

Focus upon the petitioners' claim in paragraph 10 of the petition (R. 14) at this point is deemed necessary in view of the dependence of succeeding paragraphs of the petition on such paragraph, as well as the arguments in their brief which rely on this claim. There, where the pleader purports to state carefully how the prayer is led and said, there is studiously avoided any assertion that "the manner" of saying the prayer is pursuant to the *direction* or lack of direction that the teachers in the Herricks School District may be responsible for. Petitioners must be aware that no child is *required* to join in the prayer and that it is conceivable through the training of any particular child that he or she *may* hold their hands in a particular manner and that likewise there may be hundreds of children who hold their hands entirely differently or who do not in any way take a physical posture which reflects a prayerful attitude.

Similar comment can be made regarding the assertion that during the saying of the prayer no student is per-

mitted to leave the class room. This is simply not true. On request any student may be excused in accordance with established procedure.

The petitioners, however, again and again (R. 15-17) refer to the "saying of the prayer and the manner in which it is said", seeking to pull themselves up by their own bootstraps, as it were, having first made a faulty statement of facts and then relying continuously on such faulty statement. For this reason and since these identical charges have been raised again and again and again through the cases involving comparable questions, respondents feel it incumbent to take the petition, paragraph by paragraph starting at paragraph 11 (R. 15) and set forth what the authorities have had to say on each of these subjects.

(a) The use of the public school system and the time and efforts of the teachers and staff of the schools.

Paragraph 11 (R. 15) of the petition contains merely an assertion, unsupported, that the saying of the prayer entails the use of the school system and the time and efforts of teachers and staff. The petition fails to allege anything regarding a separate tax having been levied for this purpose, any specific public monies being used for this purpose, or any damage of any kind to the petitioners. Nor is any invasion of any right of petitioners alleged.

Anticipating petitioners' claim that the ideas expressed in the foregoing paragraph are to be *inferred* from paragraph 11, it must still be concluded, based upon the judicial decisions in which this problem has been before the Court, that they have not suffered any "pocket book injury" as it is sometimes called.

This was the conclusion in *Doremus* v. *Board of Education*, 5 N. J. 435, 75 A. 2d 880 (1950), app. dis. 342 U. S. 429 (1952), where the Supreme Court of the State of New Jersey had upheld the constitutionality of a New Jersey

Statute which provided for the reading, without comment, of five verses of the Old Testament at the opening of each public school day. In this Court, Mr. Justice Jackson, writing for the majority, said:

> "Appellants, apparently seeking to bring themselves within Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, 92 L. ed. 648, 68 S. Ct. 461, 2 A.L.R. 2d 1338, assert a challenge to the Act in two capacities—one as parent of a child subject to it, and both as taxpayers burdened because of its requirements. • • •
>
> "Klein is set out as a citizen and taxpayer of the Borough of Hawthorne in the State of New Jersey, and it is alleged that Hawthorne has a high school supported by public funds. In this school the Bible is read, according to statute. There is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it. • • •
>
> "Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is valid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.' Massachusetts v. Mellon, supra (262 U. S. at 488, 67 L. Ed. 1085, 43 S. Ct. 597)."

New York State's highest Court has long reiterated this necessity of damage. The Court of Appeals held in *Adler* v. *Metropolitan Elevated Ry. Co.*, 138 N. Y. 173, 180:

> "• • • nor will the Court exert its equitable power of injunction in a case of a violation of a mere abstract right, unaccompanied with any substantial injury."

Mr. Justice Sutherland, speaking for this Court on the sufficiency of a plaintiff's interest in a constitutional issue raised by him, said:

> "That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. • • • The party who invokes the power (of judicial review) must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Frothingham* v. *Mellon*, 262 U. S. 447, 488.

(b) The saying of the Regents' prayer as the teaching of religion and religious practices, contrary to the beliefs of the petitioners "who are believers" and their children and contrary to the beliefs of the petitioner and his children "who are non-believers" and therefore, allegedly offensive to such petitioners and their children.

This topical heading is the substance of the allegations in paragraphs 12 and 13 (R. 15) of the petition.

"The term 'religion' has reference to one's views of his relations to His Creator and to the obligations they impose of reverence for His being and character and of obedience to His will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from

the latter." Thus said the New York Appellate Division, Third Department in *Drozda* v. *Bassos*, 260 App. Div. 408, 23 N.Y.S. 2d 544 (1940), quoting with approval from *Davis* v. *Beason*, 133 U. S. 333.

In Appendix C to this brief, there have been set forth the innumerable instances in which reference to Almighty God has been made in our currency, in public pronouncements, in Statutes,—indeed in almost every mode of activity of our Government. Surely, petitioners cannot seriously argue that each such instance represents a "religion" or a "religious practice" and that they find these things offensive to themselves and to their children.

As a matter of fact the petitioners must find themselves in a strangely anomalous position for on the one hand they purport to object to these references as constituting "religion" and "religious practices" and yet they rely on these very documents to support their position in this petition. Their position must be likened to that of the petitioner Joseph Lewis, who in an action against the Board of Education of the City of New York in 1953 (157 Misc. 520, 285 N. Y. Supp. 164) sought among other things to forbid the "use" of school buildings for the reading of the Bible in the public school assemblies. Of the many arguments advanced by the plaintiff there, comparable to those advanced here, the Court said:

> "Undisguised, the plaintiffs attack is on a belief and trust in God and in any system or policy or teaching which enhances or fosters or countenances or even recognizes that belief and trust. Such belief and trust, however, regardless of one's own belief, has received recognition in state and judicial documents from the earliest days of our republic." (p. 167)

The Court there focused the question as being one of "power" not policy, pointing out that the policy had already been decided and the question of power was an issue

in the sense that the determination sought was whether a constitutional guarantee or any other provision or concept of law had been violated. The statement of the Court is as follows:

> "Let it be emphasized that the concern here is with power not policy. Within the boundaries of law what shall and shall not be done in the public schools is an educational function to be determined by those intrusted with the conduct and administration of the public schools. Lewis v. Board of Education of the City of New York, 258 N. Y. 117, 122, 179 N. E. 315, 317." (p. 167)

After quoting the Declaration of Independence, the motto "In God We Trust" and the opening lines of our State Constitution, the opinion continues:

> "Nor have the courts ignored the existence of this declared policy. In People ex rel. Lewis v. Graves, 219 App. Div. 233, 238, 219 N.Y.S. 189, 195, it was said: 'A belief in religion is not foreign to our system of government.'
>
> Our highest court, in Holy Trinity Church v. United States, 143 U. S. 457, 465, 12 S. Ct. 511, 514, 36 L. Ed. 226, said: 'This is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.'
>
> These quotations are not intended to convey the thought that state and church should be brought into closer harmony. Their separation is a fundamental of immutable virility. Nor do the excerpts indicate the approval or proposal of a policy that religion be taught in the public schools. The principle that religion has no place in public temporal education is so inexorable that a reaffirmation of it would be supererogatory.

These concepts are not repugnant to the constitutional guaranty which safeguards freedom of conscience and of worship and the free entertainment and pursuit of religious beliefs. They are not hostile to section 3 of article 1 of the State Constitution, which declares that: 'The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind'." (p. 168)

• • • • •

"The sanctified principle of freedom of religious belief does not distinguish between believers and nonbelievers. It embraces both, and accords one as much protection and freedom as the other. A sect or tenet which is intolerant of those of a different sect or tenet is the precise antithesis of religious liberty. Freedom is negated if it does not comprehend freedom for those who believe as well as those who disbelieve. The law is astute and zealous in seeing to it that all religious beliefs or disbeliefs be given unfettered expression. Authentic free thinking involves the indubitable right to believe in God, as well as the unfettered license not to believe or to disbelieve in a Deity.

To examine into the sectarianism of those seeking access to public school buildings would make a travesty of our glorified liberty of conscience. Liberty for nonbelievers in God, but denial to believers in a Deity, would be a mock liberty." (pp. 169-170)

Although frequently referred to in petitioners' brief, the decision of this Court in *McGowan* v. *Maryland*, 366 U. S. 420, reviewing Sunday Closing statutes adds little support to petitioners' position. In upholding such laws, it was apparent that the Court recognized the public purpose involved and that any incidental benefit to religion did not warrant removing from the body of our laws those which recognized an integral part of our national heritage and tradition.

(c) The saying of the prayer as allegedly resulting in the exercise of coercion.

The admitted fact is that the prayer is said daily in the public schools of Union Free School District Number 9. Likewise the admitted fact must be that "we are essentially a religious people" and likewise the admitted fact must be that no child can grow up in this country of ours without hearing a constant reference to Almighty God, this being the very nature of our heritage and institutions.

The rule of the respondent Board of Education is that no child is to be required or encouraged to join in the saying of the Regents' Prayer (and if it were otherwise it is a certainty that petitioners would have emphatically so alleged in their petition). There is thus a clear distinction between the instant situation and *West Virginia Board of Education* v. *Barnette*, 319 U. S. 625 (1943), where this Court held unconstitutional the regulation of West Virginia State Board of Education requiring children in the public schools to salute the American flag and pledge allegiance to it under penalty of expulsion. The injunction was issued there, not because those whose religious beliefs were infringed upon were required to *listen* to the salute but because they were required to *join* in the Salute to the flag. It is noteworthy, however, that in recognizing the rights of those whose religion (Jehovah's Witnesses) assertedly prevented them from participating in the Salute and Pledge, the Court did not *abolish* the practice for all others. The observation of Mr. Justice Murphy in his concurring opinion in that case is worthy of note:

> "But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a Judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches." (p. 645)

Mr. Justice Douglas, speaking for the Court in *Zorach* v. *Clauson*, 343 U. S. 306, upholding the New York City release time program again indicated the unwillingness of that Court to strike from our public practices and procedures any reference to God, although it is evident from his language that he was aware that there were those who believed in no religion and who might therefore in some way claim that they were "offended." The Court's statement on the point is as follows:

> "There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. See Everson v. Board of Education, 330 U. S. 1; McCollum v. Board of Education, supra. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion as an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State."
>
> "We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds."

The recent case before this Court of *Torcaso* v. *Watkins*, 367 U. S. 203, is readily distinguishable from the principles laid down in *Zorach*. There, as a condition to becoming a notary public, deemed to be a public office, the applicant was required to profess a belief in God. This was concluded to be a "religious test oath" violative of our Constitution since it *obligated* a person "to profess a belief or disbelief" in religion (363 U. S. at p. 987). Certainly, there can be no parallel between such compulsion and the

voluntary Regents' Prayer in accordance with our fundamental national tradition.

(d) The saying of the prayer as a sectarian or denominational practice allegedly favoring one or more religions or religious practices over others and favoring religion over non-belief.

We have already seen above that the saying of a prayer as such cannot constitute religion, *per se*. Paragraphs 15 and 16 (R. 16) of the petition, summarized as in the topical heading above, can only be thought to mean, therefore, that there is some "practice" which is sectarian and denominational and favors belief in religion over non-belief. Somehow petitioners overlooked completely the inconsistency of their position in asserting their right not to believe, which no one disputes, and at the same time asserting their right to impose on all others who do believe in a Supreme Being and Almighty God, their claimed right to eliminate reference thereto.

This apparently was the claim of the plaintiffs in *Doremus* v. *Board of Education*, 5 N. J. 435, 75 A. 2d 880 (1950), app. dis. 342 U. S. 429 (1952), in New Jersey which, when it was before the Supreme Court of that State, was answered by the Court's reference to *Cooley* (Constitutional Limitations, Eighth Edition, Volume 2, p. 974) where the author says:

> "While thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provision which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper infinite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great governor of the

Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws."

Reduced to the barest simplicity, what petitioners are seeking to argue in paragraphs 15 and 16 (R. 16) of their petition is that the alleged holding of children's hands in a manner specified in paragraph 10 (R. 14) coupled with the saying of the prayer constitutes a sectarian or denominational practice favoring one or more religions and religious practices over others and favoring religion over non-belief in religion. This then means that they are disregarding, for the moment at least, whether or not the *adoption* of the procedure of saying a prayer is constitutional or not and are now saying, in effect, that even if it were constitutional, the *method* allegedly used makes the law unconstitutional. This, we submit, cannot be so. It would appear to require no citation of authority to establish in the Court's mind that no law or regulation, otherwise constitutional, can be held by a Court to be unconstitutional because of the *manner* in which some participants carry it out, namely, the practice of some children holding their hands in a certain way because of their own beliefs. This has no more foundation than would the argument that a law or regulation otherwise unconstitutional, if followed by a certain practice, could by the fact be made constitutional.

The foregoing is very similar to what the complaining parties in *Zorach* v. *Clauson*, 303 N. Y. 161, aff. 343 U. S. 306, alleged, namely, that some teacher in the New York City school system so interpreted the release time program as to adopt a practice which the petitioners felt was unconstitutional. No more credence was given by either the Court of Appeals or the United States Supreme Court in that case than should be given by this Court in the instant proceeding.

This proposition is nicely summed up by Mr. Justice Bookstein in *Lewis* v. *Allen*, 5 Misc. 2d 68, 159 N.Y.S. 2d

897, the case involving the revised rendition of the Pledge of Allegiance in the State of New York, where he said:

> "To grant this application 'would be preferring those who believe in no religion over those who do believe.' Zorach v. Clauson, supra, 343 U. S. at page 314, 72 S. Ct. at page 684. The First Amendment does not require this.
>
> Petitioners' right to disbelieve is guaranteed by the First Amendment, and neither they nor their children can be compelled to recite the word 'under God' in the pledge of allegiance. But the First Amendment affords them no preference over those who do believe in God and who, pledging their allegiance, choose to express that belief". (159 N.Y.S. 2d 813)

(e) The saying of the prayer as resulting in "divisiveness".

There are at least five school districts within a few miles of the school district represented by the respondent Board of Education which have adopted the identical prayer on the recommendation of the New York State Board of Regents. In each case this procedure has been in effect for several years and in some, five or six years, yet the students at these schools seem to be normal, well adjusted, healthy American children, not at all warped in their thinking as a result of this daily reference to Almighty God. The respondents meet weekly as a Board of Education and since the prayer was instituted there was noted no "divisiveness" among parents or children and certainly none was brought in writing to the Board of Education until petitioners served their demand, heretofore referred to. Any parent may disagree with the "advisability" of some "policy" undertaken by a Board of Education but this disagreement does not warrant a striking down of such policy as being unconstitutional.

We have already seen that in *Zorach* v. *Clauson*, 303 N. Y. 161, aff. 343 U. S. 306, released time has been held

constitutional in the State of New York yet some of the children avail themselves of one hour weekly pursuant to the release time program for religious training and others do not. Our State Courts and the United States Supreme Court, however, did not hold that the "divisiveness" thereby created, if any, would warrant striking down the release time program.

There are many occasions during a school year when children are excused for absence for the purpose of observance of religious holidays. When this occurs some children stay away from school while others attend. On still other holidays some children stay away to attend worship. Is this what petitioners call 'divisive"? Would the petitioners have this Court hold that such holiday observances should be banned because they identify one or more children with one religion or another? Certainly to do so would strike down one of our basic constitutional guarantees, i.e, religious liberty.

Complete secularism to the entire exclusion of religion or even recognition of Almighty God would be the watchword of petitioners. They would rewrite the books in which it has been held that "this is a religious people" or, as stated by the United States Supreme Court before the turn of the century, in *Holy Trinity Church* v. *United States*, 143 U. S. 457 (1892):

> "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is single voice making this affirmation." (p. 465)

In claiming "divisiveness", again we have reliance by petitioners on the *People of the State of Illinois ex rel. McCollum* v. *Board of Education of School District No. 71, Champaign County, Illinois, et al.*, 333 U. S. 203 (1949),

but we find an apt answer in the opinion of Mr. Justice Jackson when he observed, 333 U. S. at pages 232-233, 68 S. Ct. at page 476:

> "The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends non-conformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground."

(f) The saying of the Regents' Prayer as affected by (1) the prohibition against laws respecting an establishment of religion, or (2) prohibiting the free exercise thereof, or (3) the free exercise and enjoyment of religious profession and worship, without discrimination or preference.

This topical heading summarizes the allegations of paragraphs 18, 19 and 20 (R. 16-17) of the petition which, in toto, sumarize the language of the First Amendment to the United States Constitution and Article 1, Section 3 of the New York State Constitution.

As to the charge, here repeated, that the saying of the prayer constitutes an "establishment" of religion, we are content to rely on the points heretofore made that this is neither a logical nor legal conclusion which can be drawn.

As to there being a prohibition against laws which prohibit the free exercise of religion respondents can readily admit that the Constitution so provides. In the instant case, however, there is no "law" to which the petitioners can point as having "established" a religion.

We have here, not "acts which aid in the establishment of a religion, but acts whose purpose is to prevent the restriction of freedom to worship" (*64th St. Residences* v. *City of New York*, 173 N.Y.S. 2d 700, affd. 4 N. Y. 2d 268 (1958)).

Again as stated by the New York Court of Appeals in *Zorach* v. *Clauson* (303 N. Y. at p. 172):

> "• • • it must • • • be remembered that the First Amendment not only forbids laws 'respecting an establishment of religion' but also laws 'prohibiting the free exercise thereof'. We must not destroy one in an effort to preserve the other."

Again, in that same case, Judge Froessel said that instances abound which prove that not "every friendly gesture between church and State shall be discountenanced" (303 N. Y. at pp. 171-172).

(g) The saying of the Regents' Prayer as being in excess of respondents' statutory authority and in violation of their statutory duties.

In paragraphs 21 through 24 (R. 17) of the petition the petitioners have alleged, respectively, that respondents have exceeded their authority under Section 1709 of the Education Law; that if respondents relied on the Board of Regents' "Statement of Belief" then the Statement of Belief violates State and Federal Constitutions; that respondents' failure to discontinue the procedure regarding the saying of the prayer is illegal and constitutes a dereliction of duty; and that the discontinuance of the prayer is a non-discretionary duty imposed upon residents by the State and Federal Constitutions.

For the convenience of the Court we should first examine Section 1709 of the New York State Education Law. This Section is entitled: "Powers and Duties of Boards of Education" and applies particularly to Union Free School Districts.

By subparagraph 2 of Section 1709 of the Education Law a Board of Educators is given power "and it shall be its duty" to establish rules and regulations "concerning the order and discipline of the school * * * as they may deem necessary to secure the best educational results."

Should there have been anything missing from the above, there is an omnibus subparagraph 33 reading:

> "33. To have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes."

We come now to the the charge contained in paragraph 23 (R. 17) of the petition which asserts that respondents' refusal to discontinue the saying of the prayer upon demand of petitioners "is illegal and constitutes a dereliction of duty"; or, conversely, that the petitioners having made their claim, there is now a "non-discretionary duty" on the part of the respondents imposed by the Federal and State Constitutions (Petition, paragraph 24 (R. (17)).

We must now go back once more to the Declaration of Independence in its assertion of "self-evident truths" that "all men are endowed by their Creator with certain inalienable Rights." This was followed with the assertion that "to *secure* these Rights, Governments are instituted among Men." Resorting once more to the United States Supreme Court for emphasis with respect to the "securing" of these inalienable rights, we find this language in the concurring opinion by Mr. Justice Field in *Butcher's Union, etc., Co.* v. *Crescent City, etc., Co.*, 111 U. S. 746 (at p. 756):

> "As in our intercourse with our fellowmen certain principles of morality are assumed to exist, without

which society would be impossible, so certain inherent rights, lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident,' that is, so plain that their truth is recognized upon their mere statement, 'that all men are endowed', not by edicts of Employers or decrees of Parliament or acts of Congress, but 'by their Creator, with certain inalienable rights', that is, rights which cannot be bartered away or given away or taken away except in punishment of crime, 'and that among these are life, liberty and the pursuit of happiness, and to secure these' not grant them but secure them, 'governments are instituted among men, deriving their just powers from the consent of the governed'."

Apparently the "same duty" was referred to and relied upon by the petitioners in the proceeding before Justice Bookstein in *Lewis* v. *Allen*, 5 Misc. 2d 68, 159 N.Y.S. 2d 897, involving the Flag Salute where we find the terse comment:

> "No statutory duty has been shown which requires respondent to rescind or revoke the regulation. So it cannot be said that respondent has failed to perform a duty imposed upon him by Statute."

But there, as here, the petitioners contended that the duty was imposed on the respondents by the First and Fourteenth Amendments to the United States Constitution and by Article 1, Section 3, among others, of the New York State Constitution. After reviewing the Education Law provisions (as well as the Federal Code, applicable in that case) the Court concluded that in making a

regulation regarding the Flag Saiute the "respondent was performing his duties." The Court went on to say:

> "Respondent has made a regulation pursuant to express direction of a Statute of this State and in conformance with a law of the United States. How then can he be charged with failing to perform his duty?" (p. 809)

In that case the Commissioner of Education made a specific regulation regarding the Flag Salute. In the instant case, his superiors, the Board of Regents, made a recommendation which has been urged by him as a proper subject of adoption by school districts such as that in which respondents constitute the Board of Education. Here too it might be asked: "How then can he be charged with failing to perform his duty?"

By analysis to Mr. Justice Bookstein's opinion, the petitioners' contention is reduced to a claim that the respondents should not perform the duties or abide by the recommendations of either the Board of Regents or the State Commissioner of Education since to do so violates the State and Federal Constitutions. On this subject, the opinion reads (5 Misc. 2d 68, 159 N.Y.S. 2d 897):

> "To sustain that contention implies respondent has not only the right, but the duty, to determine the constitutionality of an Act of the State Legislature or of the Congress and to refuse to perform, where in his judgment, such act is unconstitutional.
>
> "Clearly, this is the exclusive domain of the judiciary. It is not a function of administrative officials."

We believe, that Mr. Justice Bookstein had a complete and final answer to allegations of this type and apparently both the New York Court of Appeals and the United States Supreme Court felt similarly in *Zorach* v. *Clauson*,

303 N. Y. 161, 343 U. S. 306, where, the record on appeal in that case shows (p. 22 of that record) that these identical charges were contained in the petition and were apparently considered to be without merit in view of the failure of either Court to agree with petitioners.

Conclusion

The noncompulsory saying of the "Regents' Prayer" does not violate any Statute giving rise to either a clear legal duty on the part of respondents to discontinue such practice, nor has there been any violation by the saying of such prayer, consistent with the basic national traditions of a religious country, as our highest Courts have said we are, which would authorize the issuance of an injunction as sought by petitioners to abolish the Prayer.

The order appealed from should be affirmed.

Respectfully submitted,

Bertram B. Daiker,
Attorney for Respondents.

Wilford E. Neier,
Of Counsel.

APPENDIX A

The State Constitutions or Preambles thereto of 49 States of the United States acknowledge that the rights and liberties of the people issue from God and express gratefulness therefor.

Alabama (Adopted in 1901)

We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama.

Alaska (Adopted April 24, 1956)

We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and religious liberty within the Union of States, do ordain and establish this Constitution for the State of Alaska.

Arizona (Adopted in 1912)

We, the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution.

Arkansas (Adopted in 1874)

We, the people of the State of Arkansas, grateful to Almighty God for the privilege of choosing our own form of government, for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and posterity, do ordain and establish this Constitution.

Appendix A

California (Adopted in 1879)

We, the people of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.

Colorado (Adopted in 1876)

We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe, in order to form a more independent and perfect government; establish justice; insure tranquillity; provide for the common defense; promote the general welfare and secure the blessings of liberty to ourselves and our posterity; do ordain and establish this Constitution for the "State of Colorado".

Connecticut (Adopted in 1818)

The people of Connecticut acknowledging with gratitude, the good providence of God, in having permitted them to enjoy a free government, do, in order more effectually to define, secure, and perpetuate the liberties, rights and privileges which they have derived from their ancestors, hereby, after a careful consideration and revision, ordain and establish the following Constitution and form of civil government.

Delaware (Adopted in 1897)

Through Divine goodness, all men have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property and in general of obtaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their con-

sent, to advance their happiness: and they may for this end, as circumstances require, from time to time alter their Constitution of government.

Florida (Adopted in 1887)

We, the people of the State of Florida, grateful to Almighty God for our constitutional liberty, in order to secure its blessings and to form a more perfect government, insuring domestic tranquillity, maintaining public order, and guaranteeing equal civil and political rights to all, do ordain and establish this Constitution.

Georgia (Adopted in 1887)

To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen, and transmit to posterity the enjoyment of liberty, we, the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution.

Hawaii (1959)

We the people of the State of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage, reaffirm our belief in a government of the people, by the people and for the people, and with an understanding heart toward all the peoples of the earth, do hereby ordain and establish this Constitution for the State of Hawaii.

Idaho (Adopted in 1890)

We, the people of the State of Idaho, grateful to Almighty God, for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

Appendix A

Illinois (Adopted in 1870)

We, the people of the State of Illinois grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations—in order to form a more perfect government, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the State of Illinois.

Indiana (Adopted in 1851)

To the end that justice be established, public order maintained, and liberty perpetuated: We, the people of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.

Iowa (Adopted in 1857)

We, the people of the State of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the State of Iowa, the boundaries whereof shall be as follows. . . .

Kansas (Adopted in 1863)

We, the people of Kansas, grateful to Almighty God for our civil and religious privileges, in order to insure the full enjoyment of our rights as American citizens, do ordain and establish this Constitution of the State of Kansas, with the following boundaries. . . .

Appendix A

Kentucky (Adopted in 1891)

We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution.

Louisiana (Adopted in 1921)

We, the people of the State of Louisiana, grateful to Almighty God for the civil, political and religious liberties we enjoy and desiring to secure the continuance of these blessings, do ordain and establish this Constitution.

Maine (Adopted in 1820 and 1876)

We, the people of Maine, in order to establish justice, insure tranquillity, provide for our mutual defense, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and, impioring His aid and direction in its accomplishment, do agree to form ourselves into a free and independent State, by the style and title of the State of Maine, and do ordain and establish the following Constitution for the government of the same.

Maryland (Adopted in 1867)

We, the people of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration for best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare. . . .

Massachusetts (Adopted in 1790)

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His

providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and for forming a new Constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish the following Declaration of Rights, and Frame of Government, as the Constitution of the Commonwealth of Massachusetts.

Michigan (Adopted in 1909)

We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity, do ordain and establish the Constitution.

Minnesota (Adopted in 1857)

We, the people of the State of Minnesota, grateful to God for our civil and religious liberty and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution.

Mississippi (Adopted in 1890)

We, the people of Mississippi in convention assembled, grateful to Almighty God, and invoking His Blessing on our work, do ordain and establish this Constitution.

Missouri (Adopted in 1945)

We, the people of Missouri, with profound reverence for the Supreme Ruler of the Universe, and grateful for His goodness, do establish this Constitution for the better government of the State.

Appendix A

Montana (Adopted in 1889)

We, the people of Montana, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a State government, do in accordance with the provisions of the enabling act of Congress, approve the twenty-second of February A. D. 1889, ordain and establish this Constitution.

Nebraska (Adopted in 1875)

We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and frame of government, as the Constitution of the State of Nebraska.

Nevada (Adopted in 1864)

We, the people of the State of Nevada, grateful to Almighty God for our freedom, in order to secure its blessings, insure domestic tranquillity, and form a more perfect government, do establish this Constitution.

New Hampshire (Adopted in 1784)

Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason . . . morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and the knowledge of these is most likely to be propogated through society by the institution of the public worship of the Deity.

New Jersey (Adopted in 1844)

We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He has so long permitted us to enjoy, and looking to Him for

a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution.

New Mexico (Adopted in 1912)

We, the people of New Mexico, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a State government, do ordain and establish this Constitution.

New York (Adopted in 1895)

We, the people of the State of New York, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution.

North Carolina (Adopted in 1876)

We, the people of the State of North Carolina, grateful to Almighty God, and the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of these blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.

North Dakota (Adopted in 1889)

We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this Constitution.

Ohio (Adopted in 1851)

We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

Appendix A

Oklahoma (Adopted in 1907)

Invoking the guidance of Almighty God in order to secure and perpetuate the blessings of liberty; to secure just and rightful government; to promote our mutual welfare and happiness, we the people of the State of Oklahoma, do ordain and establish this Constitution.

Oregon (Adopted in 1859)

All men shall be secured in the natural right to worship Almighty God according to the dictates of their own consciences.

Pennsylvania (Adopted in 1874)

We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution.

Rhode Island (Adopted in 1843)

We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same unimpaired to succeeding generations do ordain and establish this Constitution of Government.

South Carolina (Adopted in 1895)

We, the people of the State of South Carolina, in convention assembled, grateful to God for our liberties, do ordain and establish this Constitution for the preservation and perpetuation of the same.

South Dakota (Adopted in 1889)

We, the people of South Dakota, grateful to Almighty God for our civil and religious liberties, in order to form a more perfect and independent government, establish jus-

tice, insure tranquillity, provide for the common defense, promote the generel welfare and preserve to ourselves and to our posterity the blessings of liberty, do ordain and establish this Constitution for the State of South Dakota.

Tennessee (Adopted in 1870)

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their conscience; that no man can of right, be compelled to attend, erect or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interefere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

Texas (Adopted in 1876)

Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution.

Utah (Adopted in 1895)

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this Constitution.

Vermont (Adopted in 1793)

That all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of

any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interefere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

Virginia (Adopted in 1902)

That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other.

Washington (Adopted in 1889)

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this Constitution.

Wisconsin (Adopted in 1848)

We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquillity and promote the general welfare, do establish this Constitution.

Wyoming (Adopted in 1889)

We, the people of the State of Wyoming, grateful to God for our civil, political and religious liberties, and desiring to secure them to ourselves and perpetuate them to our posterity, do ordain and establish this Constitution.

APPENDIX B

HOUSE OF REPRESENTATIVES

83D CONGRESS
2d Session

REPORT
No. 1633

AMENDING THE PLEDGE OF ALLEGIANCE TO THE FLAG OF THE UNITED STATES

MAY 28, 1954.—Referred to the House Calendar and ordered to be printed

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Mr. JONAS of Illinois, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. J. Res. 243]

The Committee on the Judiciary, to whom was referred the joint resolution (H. J. Res. 243) to amend the pledge of allegiance to the flag of the United States of America, having considered the same, report favorably thereon with an amendment and recommend that the joint resolution, as amended, do pass.

The Amendment is as follows:

Page 2, line 1, strike out the comma after the words "one Nation".

Appendix B

PURPOSE

The act of June 22, 1942 (ch. 435, 56 Stat. 1074), as amended, relates to rules and customs pertaining to the display and use of the flag of the United States of America. Section 7 of that act contains the pledge of allegiance to the flag; and it is the purpose of this proposed legislation to amend that pledge by adding the words "under God" so as to make it read, in appropriate part, "one Nation under God, indivisible,".

STATEMENT

Since the introduction of this legislation the committee and a great number of the individual Members of Congress have received communications from all over the United States urging the enactment of this measure.

At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

The Supreme Court ruled in 1892 that "this is a religious nation."[1] It reiterated this holding, more recently (1951), when it stated:

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[1] *Church of the Holy Trinity* v. *U. S.* (1892) (143 U. S. 457, 470).

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> We are a religious people whose institutions presuppose a supreme being.[2]

Those words by our Supreme Court are true in a very fundamental and realistic sense. From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. For example our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper. In the year 1620, the Mayflower compact, a document which contained the first constitution in America for complete self-government, declared in the opening sentence "In the name of God. Amen." This was an open recognition, by our forebears, of the need for the official conjunction of the laws of God and with the laws of the land.

It was William Penn who said: "Those people who are not governed by God will be ruled by tyrants."

Four years before the Declaration of Independence, we find George Mason arguing to the General Court of Virginia that—

> All acts of legislature apparently contrary to the natural right and justice are, in our laws, and must be in the nature of things considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on earth.

On July 4, 1776, our Founding Fathers proclaimed our Declaration of Independence which no less than four times refers to the existence of the Creator. It states in part:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal

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[2] *Zorach* v. *Clauson* (1951) (343 U. S. 306, 313).

station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

This same document appeals to "The Supreme Judge of the world that this Nation be free, and pledges our Nation to support the Declaration "with a firm reliance on the protection of divine Providence."

During the Presidency of Abraham Lincoln, the Congress passed the act of April 22, 1864, directing that the inscription "In God we trust" be placed on our coins. This avowal of faith has been imprinted on billions and billions of coins during the last 90 years.

Later at Gettysburg on November 19, 1863, Lincoln said:

> That we here highly resolve that these dead shall not have died in vain; that this Nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth:

Recently President Eisenhower joined with Bishop Fulton J. Sheen, Dr. Norman Vincent Peale, Rabbi Norman Salit, and the American Legion Commander, Arthur J. Connell, in the American Legion's Back to God appeal in connection with its Four Chaplains' Day, Commemorating the four military chaplains who heroically gave their lives when the troopship *Dorchester* was sunk in 1943. The President declared that "all the history of America" bears witness to the truth that "in time of test or trial we instinctively turn to God." "Today, as then (Gettysburg), there is need for positive acts of renewed recognition that faith is our surest • • • strength, our greatest resource."

Appendix B

Representative Louis C. Rabaut who testified at the hearing before the subcommittee aptly stated the need for this legislation in the following words:

> By the addition of the phrase "under God" to the pledge, the consciousness of the American people will be more altered to the true meaning of our country and its form of government. In this full awareness we will, I believe, be strengthened for the conflict now facing us and more determined to preserve our precious heritage.
>
> More importantly, the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. As they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us. Fortify our youth in their allegiance to the flag by their dedication to "one Nation, under God."

Since our flag is symbolic of our Nation, its constitutional government and the morality of our people, the committee believes it most appropriate that the concept of God be included in the recitations of the pledge of allegience to the flag. It should be pointed out that the adoption of this legislation in no way runs contrary to the provisions of the first amendment to the Constitution. This is not an act establishing a religion or one interfering with the "free exercise" of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase "under God" recognizes only the guidance of God in our national affairs. The Supreme Court has clearly indicated that the references to the Almighty which run thorugh our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment (*Zorach* v. *Clauson* (343 U. S. 306,

312-313)). In so construing the first amendment, the Court pointed out that, if this recognition of the Almighty was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, "God save the United States and this Honorable Court" (id., 313).

Included as a part of this report is an opinion from the Legislative Reference Service of the Library of Congress, concerning the proper placement of the words "Under God" in the pledge of allegiance.

MAY 11, 1954.

To: Mr. Cyril F. Brickfield [Assistant Counsel], House Committee on the Judiciary.

Subject: Placing of the words "under God" in the pledge of allegiance.

The pledge of allegiance to the flag was recognized and codified by Congress in the Flag Code of 1942 (act of June 22, 1942, amended December 22, 1942, U. S. C. 36:172). The pledge law now reads: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all."

Currently, several proposals are pending, to insert in this pledge the word "under God." These present several alternatives as to placement and punctuation:

(1) • • • Republic for which it stands, one Nation, under God, indivisible, with liberty • • •

(2) • • • Republic for which it stands, one Nation under God, indivisible, with liberty • • •

(3) • • • Republic for which it stands, one Nation indivisible under God, with liberty • • •

You have asked for a brief memorandum on the question of placement and punctuation, and whether the rules of grammar point to one form rather than

another. The present statement is limited to this narrow point. Of course, before any judgment can be expressed, the fundamental question must be met—what is the exact meaning intended by the proposed insertion? On this point, we have some remarks in the Congressional Record as a guide.

Representative Rabaut, who introduced Joint Resolution 243, explained his measure in the Congressional Record of February 12, 1954, page A-1115. "Unless we are willing to affirm our belief in the existence of God and His creator-creature relationship to man, we drop man himself to the significance of a grain of sand. * * * Children and Americans of all ages must know that this is one Nation which "under God" means "liberty and justice for all."

Senator Ferguson, who introduced Senate Joint Resolution 126, commented that "Our Nation was founded on a fundamental belief in God * * * communism, on the contrary, rejects the very existence of God." (See Congressional Record, April 1, 1954, p. A-2527.)

It seems unlikely, then, that the insertion is intended as a general affirmance of the proposition that the United States of America, is "founded on a fundamental belief in God." The new language should therefore be inserted, and punctuated, so as most clearly to indicate this general thought. Under the generally accepted rules of grammar, a modifier should normally be placed as close as possible to the word it modifies. In the present instance, this would indicate that the phrase "under God," being intended as a fundamental and basic characterization of our Nation, might well be put immediately following the word "Nation." Further, since the basic idea is a Nation founded on a belief in God, there would seem to be no reason for a comma after Nation: "one Nation under

God" thus becomes a single phrase, emphasizing precisely the idea desired by the authors noted above.

This reading, will be noted, substitutes the basic concept of "one Nation under God" for the phrase now in law, "one Nation indivisible"; and "indivisible" becomes a separate prime modifier.

In the alternative reading, "one Nation indivisible under God," the phrase "under God" would be the normal rules of grammar be read as modify "indivisible," rather than "Nation." By the same reasoning, in the reading "one Nation under God indivisible," indivisible would naturally be construed as modifying the word "God."

It may be noted in passing that as the expression is used in Lincoln's Gettysburg Address [that this Nation, under God, shall have a new birth of freedom • • •] the phrase "under God" seems to mean "with the help of God." Lincoln was solemnly asking his people to resolve that the Nation, with God's help, should have a new birth of freedom. The difference in context seems adequate reason for the punctuation as given.

W. C. GILBERT, *Assistant Director.*

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the House of Representatives there is printed below in roman type without brackets existing law in which no change is proposed by enactment of this bill: New provisions proposed to be inserted are shown in italic.

Appendix B

TITLE 28, UNITED STATES CODE

§ 172. PLEDGE OF ALLEGIANCE TO THE FLAG; MANNER OF DELIVERY

The following is designated as the pledge of allegiance to the flag: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation *under God*, indivisible, with liberty and justice for all." Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

APPENDIX C

1. THE MAYFLOWER COMPACT—41 pilgrims on the deck of the Mayflower in 1620 prepared the first written constitution of our land. It opened with these words: "In the name of God, Amen," and stated that the long and difficult voyage to the new world had been "undertaken for the glory of God." They signed it "solemnly and mutually in the presence of God."

2. THE LIBERTY BELL—When the bell was cast in 1751, these words of Moses were inscribed on it: "Proclaim liberty throughout the land unto all the inhabitants thereof." (Lev. 25:10)

3. DECLARATION OF INDEPENDENCE ON GOD—On June 12, 1775, a year before the signing of the Declaration of Independence, the Continental Congress officially called on all citizens to observe "the twentieth day of July next" to be set aside as a day of public humiliation, fasting and prayer; that we may, with united hearts and voices, unfeignedly confess and deplore our many sins, and offer up our joint supplications to the all-wise, omnipotent and merciful Disposer of all events . . ."

4. THE AMERICAN SEAL—On every dollar bill the seal is pictured with the "Eye of God" directly above the pyramid. The words "Annuit Coeptis" signify: "He (God) has favored our undertakings." Congress approved this design on June 20, 1782.

5. OATH OF OFFICE—The oath taken by government employees, witnesses in court and those seeking passports concludes with the prayerful petition: "So help me God." This practice was originated by George Washington when he took his first oath of office as President of the United States, April 30, 1789.

6. NORTHWEST ORDINANCE—This document played an important part in United States history. Congress passed it on July 13, 1787, and thereby established federal control of the territory west of the Allegheny Mountains and north of the Ohio River. It included this stipulation:

> "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

7. THANKSGIVING DAY—From its very start, our nation has set aside one day to render thanks to Almighty God. The Chief Executive officially asks each citizen to express gratitude to a bountiful Creator. In his proclamation for a national Thanksgiving Day, George Washington, shortly after his inauguration, said: "Whereas it is the duty of all nations to acknowledge the Providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor. I do recognize and assign Thursday, the 26th day of November next, to be devoted by the people of these states to the service of that great and glorious Being who is the beneficent Author of all the good that was, that is, or will be."

8. WASHINGTON'S ORDER REGARDING CHAPLAINS—On July 9, 1776, less than a week after the signing of the Declaration of Independence, General George Washington issued the following order:

> "The honorable Continental Congress having been pleased to allow a chaplain to each regiment, the colonels or commanding officers of each regiment are directed to procure chaplains accordingly, persons of good character and exemplary lives, and to see that all inferior officers and soldiers pay them a suitable respect. The blessings and protection of Heaven are at

all times necessary, but especially so in times of public distress and danger."

All branches of the U. S. Armed Services are now officially staffed by thousands of chaplains.

9. National Anthem—Francis Scott Key composed the "Star Spangled Banner" during the bombardment of Fort McHenry on the night of September 13, 1814. He scribbled it on an old envelope. For 117 years, this song was popular as a patriotic hymn. On March 3, 1931 Congress adopted the "Star Spangled Banner" as our national anthem . . . It closes with this reverent praise of God:

"Praise the Power that hath made and preserved us a nation.

Then conquer we must, when our cause it is just
And this is our motto—'In God is our Trust'."

10. Motto on Coins—During the Civil War, a Protestant minister, Rev. M. R. Watkinson of Ridleyville, Pa., wrote the Secretary of the Treasury, Salmon P. Chase, on Nov. 13, 1861, requesting "the recognition of the Almighty God on our coins." He concluded his letter to Mr. Chase with this petition: "This would put us openly under the Divine protection we have personally claimed. From my heart I have felt our national shame in disowning God as not the least of our present national disasters."

On Dec. 9, 1863, after several wordings and designs had been submitted, Mr. Chase instructed Mr. James Pollock, director of the U. S. Mint in Philadelphia, to start inscribing the words "In God We Trust" on all coins.

11. Every President Paid Tribute to God—All Presidents without exception, from George Washington

to Dwight D. Eisenhower, have publicly recognized the dependence of this nation on Almighty God. These excerpts are from some of their Inaugural Addresses:

WASHINGTON—" . . . in this first official act my fervent supplications to that Almighty Being Who rules over the universe . . ."

THOMAS JEFFERSON—" . . . acknowledging and adoring an overruling Providence . . . May that Infinite Power, . . . lead our councils to what is best . . ."

JAMES MADISON—" . . . in the guardianship and guidance of that Almighty Being Whose power regulates the destiny of nations . . ."

ANDREW JACKSON—" . . . a firm reliance on the goodness of that Power Whose Providence protected our national infancy and has since upheld our liberties in various vicissitudes . . ."

ABRAHAM LINCOLN—" . . . with firmness in the right as God gives us to see the light, let us strive on to finish the work we are in . . ."

WILLIAM HOWARD TAFT—" . . . I invoke . . . the aid of the Almighty God in the discharge of my responsible duties."

WOODROW WILSON—" . . . God helping me, I will not fail them . . ."

HERBERT HOOVER—" . . . I ask, the help of Almighty God in this service to my country . . ."

FRANKLIN D. ROOSEVELT—" . . . We humbly ask the blessing of God . . . May He guide me in the days to come . . ."

Appendix C

HARRY S. TRUMAN—". . . We believe that all men are created equal because they are created in the image of God . . ."

DWIGHT D. EISENHHOWER—". . . In our quest of understanding, we beseech God's guidance . . ."

12. NATIONAL MOTTO—A Joint Resolution was als adopted by Congress on July 20, 1956, establishing "In God we trust" as the national motto of the United States. Here are the words of the official resolution:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the national motto of the United States is hereby declared to be 'In God we trust'."

13. TOMB OF UNKNOWN SOLDIER—In the National Cemetery at Arlington, Va., the official inscription on the tomb of the unknown soldier reads:

"Here lies in honored glory, an American soldier, known but to God."

14. NATIONAL MONUMENTS—They bear further tribute to the dependence of our country upon Almighty God.

WASHINGTON MONUMENT—The numerous spiritual inscriptions on its walls include these words of the Divine Master:

"Suffer the little children to come unto me and forbid them not, for of such is the kingdom of heaven." (Luke 18:16)

LINCOLN MEMORIAL—Near the massive statute of Abraham Lincoln, his words are chiseled into the granite wall:

Appendix C

". . . that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth."

JEFFERSON MEMORIAL—The forceful words of Thomas Jefferson inscribed in the monument remind all who behold them of the dire results that may follow if we forget God is the Source of our Liberty:

"God who gave us life gave us liberty. Can the liberties of a nation be secure when we have removed the conviction that these liberties are the gift of God!"